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No. 82-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, et al.,

Petitioners,

v.

NATHALIE NORRIS, on behalf of herself and all others similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Was it a violation of Title VII, under the reasoning of *Los Angeles Department of Water & Power v. Manhart,* 435 U.S. 702 (1978), for the State of Arizona to contract with independent insurance companies which used sex-based actuarial tables for the purpose of giving its employees the option of receiving their deferred compensation in the form of annuity payments, even though:

(a) the employees could elect to receive their deferred compensation in a lump sum and purchase the largest benefit which their accumulated contributions could command on the open market;

(b) all of the insurance companies which were available to the State of Arizona to provide such life annuities used sex-based mortality tables and therefore Arizona had no choice but to offer sex-based life annuities if that option was to be offered at all; and

(c) the district court found that Arizona had no intent to discriminate because the sex-based actuarial tables were the result of the judgment of the insurance companies?

2. Was it an abuse of discretion and/or did it violate the Tenth Amendment for a federal court to order the State of Arizona to supplement the future life annuity payments paid by independent insurance companies to female employees in order to make them equal to those made to similarly situated male employees:

(a) where the state legislature explicitly provided that no contribution was to be made by the state to the deferred compensation plan; and

(b) where the state was not responsible for the establishment or use of the actuarial tables upon which the independent insurance companies based these life annuities?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below are Nathalie Norris, on behalf of herself and all others similarly situated, plaintiff-appellee; Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans, the State of Arizona, and Richard Rabago, Margaret Griffith, Ted Williams, Russ Webb, Walter Madsen, Dave Conner and Jack La Sota in their capacity as members of the Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans, defendants-appellants below.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, State of Arizona ("Arizona"), Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans ("Governing Committee") and the individual members thereof in their official capacity, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit ("Court of Appeals") entered in the above-entitled case on March 11, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 671 F.2d 330 (9th Cir. 1982) (Appendix A hereto). The opinion of the United States District Court for the District of Arizona entered March 12, 1980 is reported at 486 F. Supp. 645 (D. Ariz. 1980) (Appendix B hereto).

JURISDICTION

The judgment of the Court of Appeals was entered on March 11, 1982. The Petition for Writ of Certiorari has been timely filed in accordance with the Order of Justice Rehnquist dated May 13, 1982 which extended the time for filing the petition to and including July 12, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Tenth Amendment to the United States Constitution, several provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e-2, and Sections 38-871 to 38-874 of the Arizona statutes.

The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Title VII of the Civil Rights Act of 1964, as amended, provides in the relevant section:

> (a) It shall be an unlawful employment practice for an employer—
>
> > (1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

42 U.S.C. Section 2000e-2(a)(1)

A.R.S. Sections 38-871 to 38-874 are printed in full in Appendix C hereto.

STATEMENT OF THE CASE

If any deferred compensation or retirement plan should be held *not* to violate this Court's decision in *Manhart,*[1] the Arizona plan involved here is it. The deferred compensation plan held unlawful under Title VII by the courts below permitted each employee to defer whatever portion of his or her compensation he or she chose and thereafter to recover the full amount upon retirement (1) in a lump sum so that the retiree could purchase "the largest benefit which his or her accumulated contributions could command in the open market," *see Manhart, supra,* 435 U.S. at 717; (2) in a fixed monthly amount over a specified period of time; or (3) in the form of a life annuity with the monthly payments being made by an independent insurance company. The employer, the State of Arizona, made no contributions. The courts below held the plan unlawful under Title VII because the life annuity payments were calculated by the insurance companies on the basis of sex-based mortality tables. However, all of the insurance companies which were available to Arizona to provide life annuities used such sex-based mortality tables. If *Manhart* is extended to cover such a situation, then this case clearly has serious consequences not only for many employers, but also for the insurance industry.

In 1972, the State of Arizona enacted A.R.S. Sections 38-871 through 38-874 which established a Governing Committee for the purpose of establishing a deferred compensation plan.[2] In contrast with Arizona's separate and mandatory retirement plan[3], the purpose of the voluntary deferred compensation

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[1] *Los Angeles Department of Water & Power v. Manhart,* 435 U.S. 702 (1978).

[2] There is no attack on the statutes which established the deferred compensation plan nor the plan itself, but only on that option selected by the Governing Committee which offered a life annuity.

[3] Arizona has an entirely separate and independent state retirement plan. See A.R.S. §§ 38-741 through 38-781.36, as amended. The retirement plan is mandatory, and contributions and benefits are equal for similarly situated males and females.

plan is solely to enable state employees to defer the receipt of a portion of their compensation until a later date to obtain tax benefits. Accordingly, the plan is financed solely through the employees' deferment of their income; there are no employer contributions to the plan.

The deferred compensation plan works in two phases. During the first or "accumulation" phase, employees are free to choose from a wide variety of investments into which their deferred compensation can be directed, including savings accounts, mutual funds, life insurance, or annuities. Amounts contributed by a male or female employee earn investment income at the same rate. There has been no attack on this phase of the plan.

During the second or "pay-out" phase, the employees have equally wide choices as to how their deferred funds shall be repaid to them. Once an employee retires, the employee can elect to have his deferred compensation paid back through a variety of means: the employee can elect (1) to have his deferred compensation and earnings thereon paid to him in one lump sum, (2) to receive a specific sum each month for a fixed number of months, or (3) to receive it in the form of a life annuity.

On April 25, 1978, plaintiff Nathalie Norris on behalf of herself and the class of females now or in the future enrolled in the deferred compensation plan brought an action against petitioners, alleging that the differential in monthly benefits produced by the life annuities for men and women constituted a violation of Title VII by her employer by reason of this Court's decision in *Manhart*, as well as a violation of the Fourteenth Amendment. Jurisdiction in the district court was based on 42 U.S.C. § 2000e-5(f) and 28 U.S.C. § 1343.

Both petitioners and respondent moved and cross-moved for summary judgment in the district court on the basis of a joint statement of stipulated facts. The district court deter-

mined that petitioners were in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e *et seq.*, on the ground that the benefits paid by the insurance companies under the life annuity option were determined on the basis of sex-based mortality tables and were thus unlawful under the *Manhart* decision. However, the district court specifically found that Arizona and the Governing Committee did not purposefully discriminate against female employees so as to violate the Fourteenth Amendment and dismissed that claim. The district court enjoined petitioners from carrying out their obligations under the deferred compensation plan through the use of sex-based actuarial tables and directed that future annuity payments to retired female employees be made equal to those for similarly situated male employees.

Petitioners timely appealed the decision, and the Court of Appeals affirmed the judgment. The inevitable result of this decision has been to force petitioners to remove the life annuity option from the available offerings pending a final decision of this issue. Now none of the 35,000 state employees, male or female, who have not yet retired, can select the life annuity option and all are thus equally treated. Only those female employees who have already retired and selected the life annuity option can be said to have been benefited by this decision. The State of Arizona which must make up the difference on monthly payments, the active employees who have lost the option of a life annuity, and the insurance companies which have lost that potential business are the losers.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Decision In The Instant Action Improperly Extends The Holding Of Manhart To Impose Liability On An Employer For The Practices Of Independent Insurance Companies And Therefore Presents An Important Question Which This Court Should Settle.

A. *The Lower Courts Have Had Extreme Difficulty In Applying This Court's Decision In Manhart To More Complicated Cases and Clarification By This Court Is Required.*

In *Manhart* this Court held that the requirement that men and women make unequal contributions to an "employer-operated pension fund" violated Title VII. The decision was therefore quite narrow; no private insurance companies were involved. In contrast, the cases which have now appeared in the lower courts are more complicated, and the difficulties involved in applying *Manhart* to such cases are becoming apparent.[4]

When the court of appeals in *EEOC v. Colby College*, 589 F.2d 1139 (1st Cir. 1978), reversed the lower court's dismissal of the complaint which had been brought against Colby College on account of the use of sex-based actuarial tables in pension plans provided by its insurers (TIAA-CREF), it did not even try to fully resolve the case. Instead it sent the case back to the lower court to grapple with it further. The court of appeals candidly recognized that it foresaw "difficulties, possibly very great difficulties, that did not arise in *Manhart*, in light of the Court's caveat that the statute was not intended to revolutionize the [insurance] industry." 589 F.2d at 1144. The court of appeals further noted that "[w]hether by accident, or

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[4] *E.g., EEOC v. Colby College, supra*, 589 F.2d 1139; *Spirt v. Teachers Insurance and Annuity Association*, 475 F. Supp. 1298 (S.D.N.Y. 1979); *Peters v. Wayne State University*, 476 F. Supp. 1343 (E.D. Mich. 1979); *Sobel v. Yeshiva University*, 477 F. Supp. 1161 (S.D.N.Y. 1979); *Women in City Government v. City of New York*, 515 F. Supp. 295 (S.D.N.Y. 1981); *Hannahs v. N.Y. State Teachers' Retirement System*, 26 EPD ¶ 32,037; 26 FEP Cases 527 (S.D.N.Y. 1981).

design, *Manhart* brought to the Court the case that presented the fewest difficulties, and the most conspicuous discrimination, if discrimination there were." 589 F.2d at 1143.

In *Sobel v. Yeshiva University,* 477 F. Supp. 1161, 1166 (S.D.N.Y. 1979), the district court called the problems arising from unequal benefits provided by a pension fund "vexing" and stated that "this results from the difficulty in applying the legalistic rationale of *Manhart* to a pension plan which is funded through a private insurance company." It concluded that the issue could not be decided on a summary judgment.

Other courts have resorted to characterizing the insurance carrier as an "employer" of the plan participants in order to find liability under Title VII pursuant to *Manhart. E.g., Spirt v. Teachers Insurance and Annuity Assn.,* 93 F.R.D. 627 (S.D.N.Y. 1982) and 475 F. Supp. 1298 (S.D.N.Y. 1979), and *Peters v. Wayne State,* 476 F. Supp. 1343 (E.D. Mich. 1979), *appeal pending,* No. 79-1676 (6th Cir.).

The decisions in the *Spirt* case dramatically demonstrate the problems the lower courts are encountering in attempting to eliminate all actuarially-based distinctions between the sexes. When the EEOC and the insurer (TIAA-CREF) attempted to compromise their differences by the use of a new unisex table, the New York Superintendent of Insurance refused to approve its use on the ground that it unfairly resulted in lower income benefits for males than "would have been payable had the sex-distinct mortality basis been retained." *BNA Pension Reporter,* No. 336, A-12 *et seq.* (April 6, 1981). The EEOC then filed suit against the Superintendent to enjoin him from applying the New York insurance law in conflict with the United States Constitution, Title VII, and the Equal Pay Act. TIAA-CREF then negotiated a new unisex plan which was approved by the Superintendent but held by the EEOC to violate both Title VII and the Equal Pay Act. *Spirt, supra,* 93 F.R.D. at 632. An appeal is now pending. Thus, the lower courts are now faced with disputes between the states' right to regulate the business of insurance and the federal government's power to prevent discrimination.

In another suit involving TIAA-CREF, *Peters v. Wayne State University*, 476 F. Supp. 1343 (E.D. Mich. 1979), *appeal pending*, No. 79-1676 (6th Cir.), the court felt free to render a decision holding the sex-segregated tables in violation of Title VII while not dealing with any of the financial implications since it awarded only declaratory and injunctive relief "enjoining TIAA and WSU from continuing with the TIAA retirement plan." Since TIAA must obtain the approval of the New York insurance regulators, its state of domicile, however, it is obvious that the district court in *Peters* does not have the power to carry out its mandate in its present form. Moreover, an appeal of the trial court's ruling is now pending.

The instant case went even further than any previous case. Unlike previous cases where the insurance company had a possibly symbiotic relationship with the employer, or the employer took an active role in administering the allegedly discriminatory annuity, private independent insurance companies are involved here. The court below held Arizona liable under Title VII even though (1) all insurance companies available to contract with Arizona used sex-based mortality tables and (2) a lump sum option was available to all participants.

Accordingly, there is great confusion in the lower courts as to the reach of *Manhart* and this Court's clarification and guidance is necessary.

B. *The Extension of* Manhart *In This Case To Impose Liability On An Employer For Practices Of Private Insurance Companies Would Revolutionize The Insurance And Pension Industries, Which Is Precisely What This Court Warned Against In* Manhart.

In *Manhart*, the pension fund in issue was administered entirely by the defendant employer. The defendant required female employees to make monthly contributions to the pension fund which were 14.84% higher than the contributions required of comparable male employees because women as a class live

longer than men and therefore more monthly payments could be expected to be made to the average woman than to the average man. Since the employee contributions were withheld from the paychecks, a female employee took home less pay than a male employee earning the same salary.

However, this Court explicitly limited its holding in *Manhart* to the facts of that case and stated that it was not suggesting that Title VII was intended to revolutionize the insurance and pension industries:

> Although we conclude that the Department's practice violated Title VII, we do not suggest that the statute was intended to revolutionize the insurance and pension industries. All that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund.

435 U.S. 702, 717.

Unlike *Manhart* where the employer was responsible for the unequal treatment in contributions between men and women, in the instant case private insurance companies are responsible for the payment of the annuities based on sex-based mortality tables. The State of Arizona merely purchased contracts from insurance companies in order to provide its employees with a life annuity option if they chose to exercise it.

Additionally, in the instant case, all insurance companies available to contract with Arizona used sex-based mortality tables. Accordingly, Arizona had no choice but to offer life annuities calculated on sex-based mortality tables if it were to offer the life annuity option to its employees at all.

Hence, although the plaintiff brought her complaint against Arizona as her employer, her complaint really challenges the practices of the non-party, independent insurance carriers. If employers are held liable for the practices of the insurance industry, then many employers will, as Arizona has already done, cease to offer life annuities to their employees. This will have a profound effect on the insurance and pension

industries, as well as on all employees. Given the large amount of business which the insurance and pension industries do with employers, the imposition of Title VII liability on an employer because of the practices of the insurance companies with which it contracts will "revolutionize the insurance and pension industries," which is precisely what this Court warned that *Manhart* was not intended to do.

If the insurance and pension industries are to be prevented from using sex-based mortality tables, this should be done directly through legislation specifically attacking those practices, with the benefit of open hearings and public debate as to the consequences of such legislation and the relative merits of current insurance practices. Petitioners submit that the use of Title VII against employers, such as the State of Arizona, in order to challenge the practices of the insurance industry is an important issue, the propriety of which should be settled by this Court.[5]

C. *The Court of Appeals' Decision Conflicts With The Open Market Exception Pronounced In* Manhart.

In *Manhart,* this Court stated:

> Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market.

435 U.S. 702, 717-718.

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[5] Although a number of lower courts have found employers who contract with insurance companies liable under Title VII pursuant to *Manhart,* those cases are fully distinguishable from the instant one. In each of those cases, the employer had either taken an active role in administering or developing the allegedly discriminatory annuity or the court had reached the dubious conclusion that the insurance company was in fact an "employer" under Title VII. *E.g., Henderson v. State of Oregon,* 405 F. Supp. 1271 (D. Ore. 1975); *Spirt v. Teachers Insurance and Annuity Association,* 475 F. Supp. 1298 (S.D.N.Y. 1979); *Equal Employment Opportunity Commission v. Colby College,* 589 F.2d 1139 (1st Cir. 1978); *Peters v. Wayne State University,* 476 F. Supp. 1343 (E.D. Mich. 1979). There are no lower court cases, other than the instant one, where an employer has been held liable for the practices of independent insurance companies simply because it contracted with those companies.

There are two reasons why the instant case falls squarely within such open market exception. First, unlike the pension plan in *Manhart*, equal contributions are set aside *(i.e.*, each employee is free to defer whatever amount he or she chooses), and the employees have the option of receiving their deferred compensation in the form of a lump sum so that they can purchase the largest benefit available in the marketplace.

Second, the instant case falls within the open market exception because the life annuities offered through Arizona's plan fully represent those available on the open market. Since it has been stipulated that all insurance companies available to Arizona used sex-based mortality tables for their annuities, an employee could purchase no greater benefit on the open market than he could under Arizona's deferred compensation plan.

Nonetheless, the Court of Appeals in the instant case rejected petitioners' claim that the Arizona plan fell within the open market exception of *Manhart*. It ruled that although a lump sum option was available to employees to purchase the largest benefit which they could on the open market, Arizona was nevertheless liable because its plan also offered life annuities based on sex-based mortality tables. Although the life annuities offered by petitioners' plan mirrored what was available on the open market, the Court of Appeals ruled that by offering the annuities as part of the plan, Arizona "discriminated" against women. 671 F.2d at 335.

Since petitioners offered only what the open market made available, petitioners must be found to have satisfied the open market exception in *Manhart* if that exception is to have any meaning. The lump sum option was available to purchase anything desired on the open market and the additional option of life annuities simply gave employees the opportunity of

further deferring their taxes.[6] *Manhart's* open market exception cannot mean that participants should not be given the option of purchasing annuities which mirror the open market through the employer's plan. Petitioners submit that the Court of Appeals' decision conflicts with *Manhart* and that the issue of a meaningful open market exception to *Manhart* is an important question which should be settled now.

II. This Case Poses The Important Question Of Whether An Employer Should Be Held Liable Under Title VII For Practices In The Marketplace Over Which It Has No Control.

In the instant case it was stipulated that the only actuarial tables in use by the insurance industry were sex-based. If Arizona was to offer a life annuity option to its employees at all, it had no choice but to offer life annuities based on the sex-based mortality tables utilized by the insurance industry.

Petitioners argued in the Court of Appeals that they should not be held liable under Title VII where the benefits which they could offer to their employees were limited by the marketplace. Recent decisions of this Court evidence that a defendant will not be held to have discriminated against women because of conditions which exist in the marketplace which conditions were not created by the defendant. *Harris v. McRae,* 448 U.S. 297 (1980); *General Electric Co. v. Gilbert,* 429 U.S. 125, 134 (1976).

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[6] The reason that Arizona offered life annuities as part of the plan was because this insured that employees would be able to qualify for the desired tax benefits, see Rev. Ruling 68-99 and 72-25, Internal Revenue Cumulative Bulletins 1968-1 and 1972-1, respectively. Since employees who took their deferred compensation in a lump sum would be taxed immediately on that sum, Arizona simply wanted to grant its employees as many options to obtain tax-deferred benefits as it could by offering life annuities so as to spread out the income subject to tax. The court of appeals ruled that by offering this additional tax savings, rather than forcing the employees to take their deferred compensation in a lump sum and then use the money to purchase similar annuities on the open market, Arizona was ineligible for the open market exception.

In *Gilbert* this Court held that the exclusion of coverage in General Electric's disability plan for disabilities arising from pregnancy did not constitute prohibited sex discrimination in violation of Title VII. In so ruling, this Court expressly recognized that the employer was not responsible for the fact that coverage for pregnancy would impose an additional cost for the coverage purchased on the open market. The employer's mere failure to purchase that additional coverage for females was therefore not prohibited discrimination:

> If the employer were to remove the insurance fringe benefits and, instead, increase wages by an amount equal to the cost of the "insurance," there would clearly be no gender-based discrimination, even though a female employee who wished to purchase disability insurance that covered all risks would have to pay more than would a male employee who purchased identical disability insurance, due to the fact that her insurance had to cover the "extra" disabilities due to preganancy. . . . Title VII's proscription on discrimination does not, in either case, require the employer to pay that incremental amount.

429 U.S. 125, 139 n.17.[7]

Likewise, in *Manhart*, this Court suggested that the fact that a female could not purchase as large a benefit as a male employee on the open market should not subject the employer to liability under Title VII:

> Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market.

435 U.S. 702, 717-18.

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[7] Congress had to enact a statute in order to overturn the *Gilbert* decision so as to modify Title VII to require coverage for pregnancy disability. 42 U.S.C. § 2000e(k). Similarly here, the enactment of a statute, after reasoned debate, should be necessary if the drastic step of extending Title VII to the practices of the insurance industry is to be taken.

Again, in *Harris v. McRae, supra,* 448 U.S. 297, this Court considered, *inter alia,* whether the Hyde Amendment, by denying public funding for certain medically necessary abortions, contravened the Fifth Amendment. In holding that it did not, this Court explained that while the state itself may not impose obstacles in the exercise of a woman's freedom of choice, it need not remove those obstacles not of its own creation:

> [I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. The reason why was explained in *Maher:* although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation.

448 U.S. at 316.

In the instant case, Arizona is not responsible for the fact that the insurance industry determines benefits payable from life annuities on the basis of sex-based actuarial tables. Accordingly, the fact that Arizona had no choice but to offer life annuities based on sex-based mortality tables is not an obstacle of the State's own creation. Likewise, the fact that Arizona affirmatively offered a plan which failed to compensate for the additional cost to females of purchasing annuities in the marketplace is no different from the fact that General Electric affirmatively offered a disability plan which failed to compensate for the additional cost of including coverage for pregnancy disability. In each case, a plan was offered at equal cost to males and females and any difference in treatment was the result of the additional expense of providing this particular service to women in the marketplace. It should be noted that under Arizona's deferred compensation plan, Arizona does not contribute anything to either male or female employees. It merely provides a means by which employees may obtain tax-deferred treatment of that portion of their compensation, which they choose to have deducted from their wages.

However, the Court of Appeals in the instant case ruled that Arizona was liable under Title VII, despite the fact that it was not responsible for the use of sex-based mortality tables by insurance companies in the marketplace. The Court of Appeals ruled that "Title VII has never been construed to allow an employer to maintain a discriminatory practice merely because it reflects the marketplace or available options outside the employment context." 671 F.2d at 335. No authority was given for this proposition.

Petitioners submit that the Court of Appeals' ruling is not only in conflict with the applicable decisions of this Court cited above, but that the issue whether an employer can be held liable under Title VII for the limitations of the marketplace, over which it has no control, is an important question which should be definitively settled by this Court. There are presently a number of cases before the lower courts in which the issue of the responsibility of an employer for the practices of insurance carriers have been raised.[8] Because of the number of cases in which the lower courts have extended *Manhart* to impose liability on a employer for the practices of insurance companies, this question is one which should be settled now.

III. The Court Of Appeals' Decision In The Instant Case Conflicts With A Series Of This Court's Decisions Which Require Proof Of Intent In Cases Alleging Discriminatory Treatment Under Title VII.

It is now well settled in this Court that where an employee alleges less favorable treatment on the basis of race or sex under Title VII, proof of discriminatory motive "is critical."

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[8] *E.g. EEOC v. Colby College*, 589 F.2d 1139 (1st Cir. 1978); *Spirt v. Teachers Insurance and Annuity Association*, 475 F. Supp. 1298 (S.D.N.Y. 1979); *Peters v. Wayne State University*, 476 F. Supp. 1343 (E.D. Michigan 1979); *Sobel v. Yeshiva University*, 477 F. Supp. 1161 (S.D.N.Y. 1979). The instant case, however, is the first such case where an employer has been held liable under Title VII for merely contracting with independent private insurance companies generally. Further, in none of the other cases had there been a stipulation that the only annuities available were those based on sex-based mortality tables.

Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); *accord, Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577, 580 (1978); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-806 (1973).

Most recently, in *Burdine,* this Court held that in Title VII cases involving discriminatory treatment, "[t]he ultimate burden of persuading the trier of fact that the defendants *intentionally* discriminated against the plaintiff remains at all times with the plaintiff." [Emphasis added] *Id.* at 253.

However, the Court of Appeals in the instant case rejected the requirement of intent and held that "*Manhart* required no affirmative showing of intent. Nowhere was the need to prove intent discussed." 671 F.2d at 333. The Court of Appeals erroneously reasoned that because the issue of intent was not discussed in *Manhart,* the *Manhart* decision should be interpreted as not requiring any showing of intent.[9]

However, the instant case is much different from *Manhart. Manhart* involved an *employer-operated* pension fund; by administering and using a sex-based mortality table the employer required women to make larger contributions than men and therefore clearly intended to treat women differently than men. Intent to discriminate was obvious in *Manhart;* it was not

[9] The Court of Appeals did not cite *Burdine, Furnco,* or *Teamsters* but instead cited two pre-1977 Ninth Circuit decisions, *Krause v. Sacramento Inn,* 479 F.2d 988 (9th Cir. 1973), and *Schaeffer v. San Diego Yellow Cabs, Inc.* 462 F.2d 1002, 1006 (9th Cir. 1972). Neither of these cases is relevant here. Both reflected specific employer action directly limiting employment opportunities, contrary to Arizona's "action" here which was to "offer" annuity plans which the open market would provide. Moreover, both *Krause* and *Schaeffer* involved employment decisions which locked women out of employment opportunities. In *Krause,* the employer refused to hire a woman as a bartender; *Schaeffer* involved a Title VII challenge to the rule of a taxi company which refused to permit female drivers to work more than eight-hour days, although male drivers were allowed to work nine-hour days. Clearly, in both cases, the defendant intended to treat females differently than males and the employer itself was responsible for the practice which treated them differently; neither case stands for the proposition that no showing of intent is necessary.

therefore an issue. However, in the instant case, Arizona did not itself discriminate, and it was not responsible for the practice which treated females differently than males. That treatment was the result of the sex-based mortality tables administered and used by the private insurance companies. Arizona had no choice: the only available life annuities were based on sex-based mortality tables. Accordingly, there was no showing of an intent to discriminate and a Title VII claim has not been made out. Indeed, the district court expressly found that the petitioners did not have a discriminatory motive and therefore held that the petitioners had not violated the Equal Protection Clause of the Fourteenth Amendment:

> From the facts agreed upon, it is clear that this classification was not made by the defendants but rather are the results of the insurers' judgment. This is somewhat less than the purposeful invidious gender-based discrimination necessary for a finding that the compensation plan violates the equal protection clause of the Fourteenth Amendment. The Court finds that it does not.

Norris v. Arizona Governing Committee, 486 F. Supp. 645, 651 (D. Ariz. 1980).

Accordingly, the Court of Appeals' decision in the instant case conflicts with the decisions of this Court which require proof of discriminatory intent where discriminatory treatment is alleged.

IV. The Relationship Between The Tenth Amendment And The Fourteenth Amendment Is An Important Issue Which This Court Should Settle.

Under the Arizona statute which enacted the deferred compensation plan, the plan was to operate "without cost or contribution from the state. . . ." A.R.S. § 38-871 C. The plan was entirely financed by deductions from employee compensation in the amount selected by that employee.

In the instant case, the relief ordered by the district court required, *inter alia,* the State of Arizona to contribute to the plan to equalize the benefits received by males and females. The Ninth Circuit affirmed this award. Such an award overturns the nondiscriminatory legislative judgment of the State of Arizona that no contribution from the State's budget should be made to the tax-deferred compensation plan.

In *National League of Cities v. Usery,* 426 U.S. 833 (1976), this Court held that Congress may not exercise its power to regulate commerce "so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." *Id.* at 855. There, plaintiffs challenged the validity of the 1974 Amendments to the Fair Labor Standards Act which extended the minimum wage and maximum hour provisions to almost all public employees employed by the states and by their various political subdivisions. Citing the increased costs which the application of the 1974 Amendments would impose on state and local governments and the burdens and restrictions those increased costs would place upon state budgets, this Court held that "insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, Cl. 3." *Id.* at 852.

Although the holding in *National League of Cities* was limited to the Tenth Amendment's limitation on the authority granted Congress under the Commerce Clause, this Court stated that it expressed no view as to whether different results might be obtained if Congress sought to affect integral operations of state governments by exercising authority granted it under another section of the Constitution, such as Section 5 of the Fourteenth Amendment. 426 U.S. at 852 n. 17.

Nonetheless, the Court of Appeals in this case has interpreted *National League of Cities* to mean that the "Tenth Amendment *only* limits laws passed pursuant to the Commerce

Clause." [Emphasis added in the original] 671 F.2d at 336. It ruled that since *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), "clearly holds that the Title VII amendments which extended the Act to state government employees were passed pursuant to Section 5 of the Fourteenth Amendment," 671 F.2d at 336, the Tenth Amendment was not applicable here. Petitioners submit that the issue whether the imposition of damages under a statute enacted pursuant to the Fourteenth Amendment is limited in any respect by the Tenth Amendment is an important one which should be settled by this Court.

Indeed, the award in the instant case displaces a non-discriminatory state legislative decision concerning the allocation of the state budget and is therefore inconsistent with the very basis of the federal system which the Constitution created. The exercise of power pursuant to the Fourteenth Amendment can infringe upon the concept of federalism embodied by the Tenth Amendment no less than the exercise of power under the Commerce Clause as in *National League of Cities*.

In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), this Court held that the imposition of an award of damages against a state government pursuant to Title VII did not violate the Eleventh Amendment because the Eleventh Amendment, and the principle of state sovereignty which it embodies, were necessarily limited by the enforcement provisions of Section 5 of the Fourteenth Amendment. *Id.* at 456. However, this is not a case as in *Fitzpatrick* where the state actually budgeted a retirement plan but then paid benefits thereunder in a discriminatory manner. In the instant case, funds were not budgeted in a discriminatory manner; indeed, they were not budgeted at all. Instead, the deferred compensation plan was directed to operate without any cost to the state. It was funded entirely by those funds which the state employees elected to defer.

While not every imposition of damages against a state is inconsistent with the Eleventh Amendment since the sovereign immunity embodied by that amendment can be waived,

Fitzpatrick v. Bitzer, supra, 427 U.S. 445, and not every imposition of damages against a state threatens the very basis of the federal system created by the Constitution, *see New York Gaslight Club, Inc. v. Carey,* 447 U.S. 54 (1980), a court order, as in the instant case, which displaces a nondiscriminatory state legislative decision concerning the structure of the state budget is inconsistent with the very basis of the federal system which the Tenth Amendment embodies.

In *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1 (1981), this Court ruled that the inference that Congress intended to enact an affirmative obligation upon a state pursuant to Section 5 of the Fourteenth Amendment is weakest where "the rights asserted impose *affirmative* obligations on the States to fund certain services, since we may assume that Congress will not implicitly attempt to impose massive financial obligations on the states." *Id.* at 16-17. Hence, this Court has recognized that the imposition of affirmative obligations on a state pursuant to Section 5 of the Fourteenth Amendment can infringe on the federal system which the Constitution created.

Petitioners submit that this case raises the important issue of whether the imposition of damages under a statute (Title VII) enacted pursuant to the Fourteenth Amendment is limited in any respect by the Tenth Amendment. The lower court's order imposes an affirmative obligation on the State of Arizona to compensate females for the lower annuity benefits which they receive as a result of the practices of the insurance industry, whereas the plan in which the female employees enrolled was to be without cost to the state.

CONCLUSION

The Court of Appeals' opinion poses important and recurring questions of federal statutory and constitutional law relating to the reach of this Court's decision in *Manhart*, the imposition of liability under Title VII for limitations in the marketplace over which an employer has no control, and the relationship between the Tenth Amendment and the Fourteenth Amendment. For each and all these reasons, each within the scope of Supreme Court Rule 17.1, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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